

IN THE MATTER OF THE ARBITRATION BETWEEN:

AFSCME Local 3135,

Union,

and

HOUSING AUTHORITY OF PORTLAND,

Employer.

ARBITRATOR'S

OPINION

AND

AWARD

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Recognition Clause Grievance

**HEARING SITE:** Housing Authority of Portland  
Portland, Oregon

**HEARING DATE:** May 10, 2001

**RECORD CLOSED:** July 17, 2001

**DATE OF AWARD:** August 17, 2001

**ARBITRATOR:** William F. Reeves  
P.O. Box 1259  
Ashland, OR 97520

**APPEARING FOR THE UNION:**  
Monica A. Smith, Attorney  
Smith, Gamson, Diamond & Olney.

**APPEARING FOR THE EMPLOYER:**  
Howard Rubin, Attorney  
Amburgey & Rubin, P.C.

## WITNESSES

Eva Reyes B Human Resources Manager, HAP

Tom Peters B AFSCME Local 3135 President; Development Finance Coordinator, HAP

Gabriela Downey B Council Representative, Oregon AFSCME Council 75

## PARTIES

The Housing Authority of Portland (HAP or Employer) is a public agency that purchases, develops, and manages public housing for low and middle income people in the metropolitan area of Portland, Oregon. HAP employs approximately 290 people and many of these employees are in one of two bargaining units. One bargaining unit containing approximately 100 employees is represented by AFSCME Local 3135 (Union). Employer and Union have negotiated labor agreements since 1982. The 2000 - 2001 collective bargaining agreement (CBA) is applicable to the instant grievance.

## NATURE OF PROCEEDINGS

This arbitration was conducted pursuant to the parties' CBA. A court reporter recorded the hearing and provided a transcript. At the hearing, witnesses were examined and cross-examined, and exhibits introduced. The parties presented oral opening statements and written closing arguments. The record closed on July 17, 2001, upon my receipt of Union's reply brief.

## BACKGROUND AND FACTS

Union filed this grievance on October 2, 2000, contending Employer was excluding a number of current employees from the AFSCME bargaining unit in violation of CBA Article 2.1 ("recognition Clause"), which provides:

The Employer recognizes the Union pursuant to the certification of results of the secret ballot election conducted by the Oregon Employment Relations Board in ERB Case No. C-84-80. Employees referred to in this unit shall include all probationary, regular full-time and part-time employees of the Employer who work twenty (20) or more hours per week, but shall exclude supervisors, confidential **and all other employees**. (Emphasis added).

The positions in question are listed below.<sup>1</sup> The parties stipulated that the positions are currently neither supervisory nor confidential. I find a recap of the parties' history is necessary to determining the issues including, the timeliness issue.

### *The Original Certification*

On June 18, 1980 the Oregon Employment Relations Board (ERB) certified the AFSCME bargaining unit which it described as:

All employees except those already represented in Maintenance and Supervisory and Confidential employees.

### *Prior Litigation*

The parties have been before the ERB on related issues in the past. Before the parties negotiated their first contract, Employer petitioned the ERB for a unit clarification for the newly formed AFSCME bargaining unit. Following a hearing and proposed order, the ERB adopted the parties' stipulated resolution which excluded the Area Directors and Rental Director from the bargaining unit, and included the Community Relations Director in the bargaining unit. *See HAP I* (December 2, 1980), Exhibit J-15.

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<sup>1</sup>Administrative Assistant I, Asset Manager, Assistant Site Manager, Construction Manager Specialist, Cook/Homemaker, Drafting Specialist, Energy Officer/Safety Officer, Housing Program Analyst, Meal Servers, Planner, Project Manager, and Property Specialist.

In 1992, Union filed a unit clarification petition with ERB seeking a determination that fifteen (15) job classifications were included in its existing bargaining unit with Employer.<sup>2</sup> HAP objected contending that certain positions were supervisory or confidential, and certain positions were excluded by the parties' express agreement. The ERB found the certification language and the recognition clause described a "wall-to wall" unit. However, the ERB found Union explicitly or implicitly accepted that the petitioned-for positions were excluded from the bargaining unit. Given the historical development of the unit, the ERB concluded there was no genuine disagreement between the parties about the status of these positions and dismissed the petition. *See HAP II* (August 5, 1992), Exhibit J-17.

In 1993, Union challenged two new positions (Property Specialist and Prevention Services Coordinator) which HAP contended were excluded as supervisory. ERB dismissed the petition on March 4, 1993, finding the petition was improperly filed as a Subsection (3) petition. ERB noted the petition could have been filed under subsection (4) [to add new positions to a unit], or subsection (2) [to challenge a position's exclusion based on an employee's supervisory or confidential status]. *See HAP III* (March 4, 1993), Exhibit J-19.

In 1995, Union filed a Subsection (2) petition contending the position of Purchasing Agent should be moved into the bargaining unit because the position was no longer performing supervisory duties. On April 12, 1995, Union withdrew its petition.

### *Bargaining History*

CBA Article 2.1 has not significantly changed since first negotiated in 1982.<sup>3</sup> The CBA also contains a Schedule A which contains job titles and salary ranges for bargaining unit positions. The Schedule A is produced by Employer, and traditionally the parties have only bargained the COLA or incremental adjustments to the wage schedule. The parties never discussed what job titles

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<sup>2</sup>Union withdrew four positions from the original petition, the remaining positions were: administrative analyst; public affairs coordinator; CIAP inspector; graphic specialist; program coordinator; housing development coordinator; housing management counsel; program coordinator; energy officer / contract specialist; staff architect; rehabilitation specialist; administrative assistant; staff assistant; assistant area manager; and drug elimination program manager.

<sup>3</sup>CBA Article 2.1 has changed slightly. However, the parties agreed the changes were of a housekeeping nature, and no significant changes were made.

were included in the Schedule A. However, the Schedule A has varied over time as a result of additions to the unit, deletions from the unit and changes to position titles.

Before bargaining for the 2000 - 2001 CBA, Union identified as a bargaining issue of interest: "Who is in the bargaining unit and who is not?" Employer stated that this issue should not be part of the bargaining process. However the parties continued to discuss the issue as part of a sidebar agreement whereby an election would be held to determine the status of certain positions. During this process, Union identified several positions which it felt should be included in the bargaining unit. All of the positions listed in this grievance were identified by Union as part of that sidebar bargaining process. No resolution was reached on this issue by the time the main contract negotiations concluded in August 2000.

#### *Other*

CBA Article 13.2 requires Employer to notify Union in writing when a new job is created which the Employer believes to be included in the bargaining unit. Union acknowledges that Employer has faithfully complied with this obligation. The CBA is silent regarding any notification by Employer when a new job is created which Employer believes is outside the bargaining unit. Typically, Employer has not provided direct notice to Union in these situations. However, the parties have communicated with each other over bargaining unit issues, for example:

1. On June 25, 1985, Union responded to Employer's request to permanently exclude the CIAP Technician from the bargaining unit. Council Representative Kieran Carney agreed to a permanent exemption as long as the actual job functions did not significantly change.
2. On August 22, 1989, Council Representative Ken Allen requested a list of all HAP employees by job title and bargaining unit, or a reason why each employee is excluded from the bargaining unit.
3. On October 13, 1989, Employer provided Union with a list of HAP employees dated September 20, 1989. The Employer identified those employees in the AFSCME and building Trades bargaining groups. As for the reason given for excluding the other listed employees from the bargaining units, Reyes stated they were excluded "by the recognition clause of the labor agreement and past practice." Employer did not separately identify those positions excluded because of supervisory duties, confidential duties, or past practice.

4. In January and February 1995 the parties corresponded regarding their views on whether Property Managers and Site Managers should be excluded from the bargaining unit based on the supervisory status.
5. On September 29, 1999, Personnel Manager Reyes notified AFSCME President Peters that Employer was restoring the Budget Analyst position, but was excluding the position from the bargaining unit because it was confidential.

Union bargaining unit positions are distributed throughout Employer's operation. Union President Peter's acknowledged that union officers, shop stewards or bargaining unit members probably know and have daily contact with every person in the contested positions.

Employer communicates job openings when they become available by posting them on company bulletin boards. Some typically "on-site" positions such as Meal Server, Cook, and Assistant Site Manager may be just posted at the site. In the last several years all job openings are also listed in the HAP daily bulletin which is e-mailed daily. Employer does not post job reclassifications, and Employer typically does not notify Union when an exempt supervisory position is stripped of its supervisory duties.

## **ISSUE**

The parties did not stipulate to an issue statement, although their proposed issue statements are similar. I find the issues to be as follows:

Is the grievance timely?

If so, did Employer violate the CBA by excluding bargaining unit positions which are covered by the recognition clause?

If so, what is the proper remedy?

## **PARTIES' ARGUMENTS**

### **Union' s Arguments**

Union contends the grievance is timely because the dispute is a continuing violation which should not be barred by a contractual grievance timeline. As to the merits, Union contends the disputed positions are covered by the CBA' s recognition clause. Further, Union contends it did not waive the inclusion of the positions in the bargaining unit because Union did not know the positions were being excluded from the bargaining unit. According to Union, if Employer wanted to find out if Union had an objection to its treatment of a position, then Employer could send a notice directly to Union. Further, Union contends the disputed positions were not previously litigated before the ERB; but Union concedes that if I find any of the disputed positions were previously litigated, then the position should be excluded from the unit until the duties undergo a significant change. Finally, Union argues the wage schedule neither defines nor limits the bargaining unit description

### **Employer' s Arguments**

Employer contends the grievance is untimely because it was not filed within 10 working days after any precipitating "occurrence" as required by CBA Article 10.2. Employer contends Union "knew" of the alleged contract violation since Union filed a petition with the ERB in 1992. Further, according to Employer, Union' s continuing violation argument is flawed because the CBA contains no such exception to the 10-day filing requirement; and the CBA expressly denies the arbitrator authority to "add to, subtract from, or in any way modify the terms of the Agreement." Additionally, Employer contends a continuing violation theory is recognized only in cases where an employee can show continuing day-to-day injury from the alleged contract violation. According to Employer, Union presented no such evidence.

Regarding the merits, Employer contends CBA Article 2.1 does not incorporate into the bargaining unit newly created positions that did not vote in the 1980 certification election and that the parties have consistently treated as unrepresented. Employer contends Union has acquiesced in the historical exclusion of positions from the bargaining unit, and cannot use the recognition clause to incorporate those positions into the unit at a later date.

## OPINION

### *Timeliness*

The evidence indicates Union has questioned Employer's interpretation of the Recognition Clause since at least August 22, 1989, when Union requested a listing of all HAP employees with the reason for each non-union employees exclusion from a bargaining unit (*See* Exhibit E-7). Additionally, Union filed several unit clarification petitions with the ERB, the largest of which challenged eleven job classifications (*See* HAP II). Finally, Union attempted to resolve the issue during the 2000 contract negotiations, but the parties were unable to reach an agreement on this issue. Union certainly could have grieved this matter earlier. Employer contends Union should have grieved the matter earlier; and because Union failed to timely grieve the matter it is now time-barred by CBA Article 10.2.

I find an arbitrator obtains his or her authority from the labor agreement. Accordingly, if the agreement contains clear time limits for filing and prosecuting grievances, then the claim may be dismissed as non-arbitrable unless the opposing party waived this procedural defect. However, arbitrators frequently resolve doubts over the interpretation of contractual time limits against the finding of a forfeiture. *See* Elkouri & Elkouri, *How Arbitration Works* (5<sup>th</sup> ed. 1997) at 277. Additionally, many arbitrators find contractual time limits do not apply because the violation is of a continuing nature, i.e., it is repeated from day to day. Thus, each new "occurrence" gives rise to a new filing deadline.

I find the act of improperly classifying a position is a contract violation which recurs on a daily basis. Furthermore, contrary to Employer's contention, I find CBA Article 10.2 does not prohibit an arbitrator from finding a continuing violation. To the contrary, I find CBA Article 10.2 implicitly permits the filing of grievances for continuing violations. The operative language of Article 10.2 requires grievances to be taken up "within ten (10) working days of its occurrence or the date the employee should have reasonably known of its occurrence." I find that if the parties wanted to prohibit the filing of grievances based on a continuing breach of the agreement, then the parties would have worded the provision differently. I find the parties could have required grievances to be taken up "within ten (10) working days of its **first** occurrence or the date the employee should have reasonable known of its occurrence," or "within ten (10) working days of its

occurrence or **within ten (10) days** of the date the employee should have reasonably known of its occurrence, **whichever is shorter**.” Instead the parties used the language of CBA Article 10.2 which I find starts the 10-day period running every time a violation occurs. In the event of a continuing violation, the 10-day period starts anew every day. Thus, I find the grievance timely.

### *Merits*

In this grievance, Union alleges a contract violation. Therefore, Union bears the burden of proving by a preponderance of the evidence that Employer violated the agreement.

At the heart of the dispute is CBA, Article 2.1, the Recognition Clause, which provides:

The Employer recognizes the Union pursuant to the certification of the results of the secret ballot election conducted by the Oregon Employment Relations Board in ERB Case N. C-84-80. Employees referred to in this unit shall include all probationary, regular full-time and part-time employees of the Employer who work twenty (20) or more hours per week, but shall exclude supervisors, confidential and all other employees.

Article 2.1's first reference is to the ERB's unit certification, which describes the unit as: "All employees except those already represented in Maintenance and supervisory and Confidential employees." In negotiating the CBA the parties did not include this language, and neither side was able to present any evidence of the parties' intent upon first negotiating this provision. However, evidence was introduced relating to the parties' past practice in determining the scope of the bargaining unit. Exhibit E-6 contains an attached letter dated June 25, 1985, in which Union agreed to a permanent exemption from the bargaining unit of the CIAP Technician. The CIAP Technician was neither supervisory nor confidential, yet Union agreed to a permanent exemption for this position "as long as the actual job functions do not change significantly as to become a bargaining unit position." Other evidence shows Union exempted other positions from the bargaining unit. *See HAP II* Findings of Fact Nos. 8 [Union agrees Public Affairs Coordinator position was appropriately outside the unit, 1983]; 9 [Union agrees Congregate Care Coordinator (Program Coordinator) position was outside the bargaining unit, 1984]; and 10 [Union agrees Policy Coordinator (Administrative Analyst) position is outside the bargaining unit].

Additionally, I find evidence Union historically did not seek representation for those positions where the employees lived on the site. Reyes testified that: "Typically Union was not interested in positions that lived on site" (Tr. 193). A similar statement was expressed by a January

25, 1995 e-mail from Union President Evelyn Bush to Eva Reyes: “Since HAP staff who reside in the developments where they work have never been in the union . . . .” (Exhibit U-8).

Further, I find employees working in the Comprehensive Improvement Assistance Program (CIAP) (which was funded by federal grants) were considered by the parties to be outside the bargaining unit (although the CIAP Secretary was in the bargaining unit). The CIAP program no longer exists but functions remain under titles such as construction and capital improvements

Based on the above, I find the parties clearly intended to include within the phrase “all other employees” those members of other unions and at least employees in those positions explicitly excluded from the unit by Union.<sup>4</sup>

I also find the parties have historically treated some positions as beyond the scope of the unit even though Union may not have explicitly excluded those positions from the unit. This was one of the specific findings by the ERB in *HAP II* which resulted in a dismissal of Union’s unit clarification petition. I find the ERB’s analysis in *HAP II* provides a useful starting point, and many of ERB’s *HAP II* findings are relevant to my analysis and findings in this matter.

First, in *HAP II* the ERB noted Union’s petition was filed under OAR 115-25-005(3), which required the Board to determine whether certain positions are or are not included in a bargaining unit under the express terms of a certification description or collective bargaining agreement. The ERB noted the focus on these cases are quite narrow. The ERB found as a matter of law that Subsection (3) petitions require the Board to determine whether a position is in a unit, not whether a position

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<sup>4</sup>Employer argues that a plain reading of CBA Article 2.1 recognizes Union as only representing all of the positions that were certified in the 1980 election. According to Employer, “all other employees” means all positions which were not part of the certification election. I find this argument contrary to the wording of Article 2.1 and recognition clause, and contrary to the ERB’s holding in *HAP II*. Furthermore, if “all other employees” included all newly created positions since the certification election the parties would be powerless to add any of the new employees to the bargaining unit.

**should be** in the unit. I find a nearly identical question is presented by this grievance: Are certain positions presently in the bargaining unit?

Second, the ERB found the CBA's Recognition Clause describes a wall-to-wall unit consistent with the unit certification. However, the ERB noted there was no scrutiny of the scope of the unit. The ERB concluded that Union included in its original unit designation petition those positions which it wanted in the bargaining unit, and those positions were in the contemplation of the parties as the first contract was negotiated. Finally, the ERB found that since that time, the parties had mutually clarified the scope of the unit and the status of individual positions on numerous occasions

Third, the ERB specifically rejected Employer's argument that CBA Schedule A is a laundry list of inclusions to the bargaining unit. The ERB noted Employer's argument was contrary to well-established Board precedent, and the CBA's Recognition Clause made no reference to Schedule A.

Thus, I find the ERB examined the facts to see whether Union explicitly or implicitly accepted that certain positions were not in the bargaining unit given the historical development of the unit.<sup>5</sup>

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<sup>5</sup>Some of the positions in the HAP II petition were supervisory or confidential. The ERB excluded those positions because they were supervisory or confidential.

Although this grievance differs from the facts in *HAP II* in that the parties have stipulated the subject positions are neither supervisory nor confidential, I find the ERB's approach in *HAP II* is proper for the instant grievance. I find if Union has historically accepted a position as being outside the bargaining unit then Union cannot use the recognition clause to later seek inclusion of the position into the unit. *See generally, A.G. Communications Systems*, 105 LA 655 (Arbitrator Doering, August 12, 1995) [Union acquiesced in the historical exemption of non-union System Testers when union was aware of alleged basis for its grievance during recent negotiations and during which Union made no mention of the System Testers or any attempt to bargain in their behalf].<sup>6</sup>

I find Employer bears the burden of establishing Union's historical or implicit acceptance of the positions being non-union because it is an affirmative defense. As part of its burden in establishing Union's historical or implicit acceptance, I find Employer must show Union knew or should have known Employer was exempting a position from the bargaining unit. I find some positions, such as Meal Servers, Assistant Site Managers, and Cook/Homemakers are obviously neither supervisory nor confidential. Other positions may require employer to establish that Union knew the position was exempted from the unit, and not excluded from the bargaining unit as supervisory or confidential. This requirement is especially important given the fluidity of the job descriptions and the changing nature of the supervisory duties. One obvious way for Employer to establish Union's knowledge is by producing a transmittal letter notifying Union of the position and the reason for the exemption from the bargaining unit. Although not required by the CBA, such notification provides substantial evidence of Union's knowledge upon which to base a defense of Union acceptance.

I find the following factors are relevant to my determination of whether the Union has historically or implicitly accepted the position as outside the bargaining unit.

1. Was the position previously litigated in one of the ERB Unit Clarification Petitions?

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<sup>6</sup>Although Arbitrator Doering found the union acquiesced in the historical exclusion of the System Testers from the unit, his remedy was limited to the then-existing situation. Further, Doering required Employer to provide specific information including job openings to Union on a continuing basis to assure that the union is informed of changes or expansion and has the opportunity to challenge any perceived incursion into its jurisdiction in which it has not acquiesced. *A.G. Communications* at 661.

2. How long has the position existed?
3. When was the last time the job was posted?
4. What is the nature of the position, i.e., is the position clearly not supervisory or confidential such as a Meal Server?
5. If Employer's reason for excluding the position from the unit was not based on the position's supervisory or confidential status, did Employer communicate that reason to Union; or did Union know, or should have known, the position was neither supervisory nor confidential?
6. If the Employer did not clearly communicate the reason for excluding the position from the unit (e.g., the September 20, 1989 list provided by employer on October, 13, 1989 in Exhibit E-6.), did Union follow up with a more detailed inquiry?
7. If Union knew or should have known Employer was treating a non-supervisory, non confidential position as exempt from the bargaining unit, did Union question the Employer's position during negotiations?

With the above background in mind, I will examine the positions at issue in this grievance:

**Construction Manager Specialist.** This position was created in the early 1980's and first titled CIAP Inspector. In 1992, the title of the position was changed to Construction Manager Specialist. Neither the Construction Manager Specialist position nor its predecessor position of CIAP Inspector have ever been supervisory or confidential. The CIAP Inspector was a position within Union's unit clarification petition in *HAP II*. Based on the evidence presented, I find the Construction Manager Specialist position is the successor position to the CIAP Inspector which was excluded from the bargaining unit by ERB in *HAP II*.

**Assistant Site Managers.** These positions were created in 1995 as a pilot project. Assistant Site Managers live on-site and serve to backup the Site Manager. Employer did not produce evidence regarding the original reason for excluding site managers from the bargaining unit. However, I find Union knew or should have known the Assistant Site Managers were neither supervisory nor confidential employees. Further, historically Union expressed no interest in representing these employees who typically live on-site. I find Union has historically accepted the Assistant Site Managers being outside the bargaining unit.

**Cook / Homemaker.** These positions are long-standing positions, and most Cooks are recruited on site. Employer did not produce evidence regarding the original reason for excluding Cooks from the bargaining unit. However, I find Union knew or should have known the Cooks were neither supervisory nor confidential employees. Further, historically Union expressed no interest in representing these employees who typically live on-site. I find Union has historically accepted the Cook / Homemaker position being outside the bargaining unit.

**Meal Servers.** Meal Servers are part-time employees who are typically recruited on site. The Meal Server position was listed as a non-AFSCME member on the September 20, 1989 list provided to Union, yet Union made no effort to follow up with a more detailed inquiry. Further, I find Union knew or should have known the Meal Servers were neither supervisory nor confidential employees. Finally, historically Union expressed no interest in representing these employees who typically live on-site. I find Union has historically accepted the Meal Server position being outside the bargaining unit

**Planner.** The position of Planner was created in 1988. The most recent posting for the position was in May 2000. The Planner position was listed as a non-AFSCME member on the September 20, 1989 list provided to Union, yet Union made no effort to follow up with a more detailed inquiry. The Planner position also existed before Union filed its unit clarification petition in *HAP II*, yet Union did not include the Planner position in its unit clarification petition. Union did not question this position's classification in the 1990, 1994, 1996, or 1997 negotiations. I find Union has historically accepted the Planner position being outside the bargaining unit

**Project Manager.** According to Human Resources Manager Reyes, the Project Manager position was initially described as a Rehabilitation Specialist. In the early 1990's it was reclassified to Development Contract Administrator. In 1994, the position was reclassified to that of Project Manager, although Reyes testified the duties remain the same. Union did not refute this evidence. The last opening for this position was posted in 1994. The Rehabilitation Specialist was one of the positions contained in Union's unit clarification petition in *HAP II*. Based on the evidence presented, I find the Project Manager position is the successor position to the Rehabilitation Specialist which was excluded from the bargaining unit by ERB in *HAP II*.

**Drafting Specialist.** The Drafting Specialist position was created and filled in 1994. Employer did not present any evidence as to why the position was originally excluded. Employer

did not produce any evidence that Union was notified of the creation of the position or the reason the position was excluded. However, I find the position existed for six (6) years before this grievance. I also find a Drafting Specialist position is not a position one would expect to be supervisory or confidential. Nevertheless, Union did not question the position's classification during the 1996 or 1997 negotiations. I find Union knew or should have known the Drafting Specialist position was neither supervisory nor confidential; by not objecting to its exemption from the bargaining unit for six years, Union has historically accepted the Drafting Specialist position being outside the bargaining unit.

**Energy / Safety Officer.** The Energy Officer position was first created in 1988 and its history is less than clear. In June 1987, Employer notified Union the Energy Officer position was "a temporary (one-year) reclassification of the incumbent CIAP Technician." (Union had previously permanently exempted the CIAP Technician). In 1989 the position was renamed to Energy Officer/Contract Specialist. The Energy Officer/Contract Specialist position was listed as a non-AFSCME member position on the September 20, 1989 list provided to Union. The Energy Officer position was one of the positions contained in Union's unit clarification petition it was excluded from the bargaining unit by the ERB in *HAP II*. In 1995 or 1996, the position was supervisory for approximately one-year; and Union was informed it was supervisory at that time. In 1998, Safety Officer duties were added to the position. Comparing the current position description to the 1989 version, I find the current position description lists three new essential functions which relate to Safety Officer duties. However, the majority of the position's essential functions remain unchanged. Based on the evidence presented, I find the Energy/Safety Officer position is the successor position to the Energy Officer position which was excluded from the bargaining unit by ERB in *HAP II*. Furthermore, I find the energy Officer (and its variants) is a position which has been exempt from the bargaining unit since its initial CIAP roots. Accordingly, I further find Union has historically accepted the Energy / Safety Officer position being outside the bargaining unit.

**Housing Program Analyst.** The Housing Program Analyst existed in the 1980's, but presumably was vacant by 1989 because the Housing Program Analyst position was not listed as a non-AFSCME member position on the September 20, 1989 list provided to Union. After at least a ten-year lapse the position was recreated and filled in 1998. Employer did not produce any evidence that Union was notified of the position or the reason the position was excluded from the

bargaining unit. This position was listed by Union as one of the positions of interest or concern in the year 2000 bargaining. Based on the above, I find this was in essence a new position in 1998. Further, I find no evidence Union explicitly excluded the Housing Program Analyst position from the bargaining unit. Additionally, I find Employer did not make a sufficient showing that Union accepted the Housing Program Analyst position was historically excluded from the bargaining unit. Accordingly, I find the Housing Program Analyst position is part of the bargaining unit.

**Asset Manager.** This position was created in 1994, and was a supervisory position at that time. In 1998, one of the Asset Manager positions (D. Trappy) lost its supervisory responsibilities. In February 2000, another Asset Manager was hired (D. Kelly) without supervisory responsibilities. A third Asset Manager (A. Trullinger) still has supervisory duties. The predecessor to the Asset Manager was the Property Specialist, a supervisory position created in 1992, although the duties changed in 1994 along with the title.

In *HAP III* the ERB rejected Union's unit clarification petition which sought to include the position of Property Specialist in the bargaining unit. However, in *HAP III*, Employer argued the Property Specialist position was properly excluded as supervisory. I find the ERB's denial was based a finding that Union should have filed the petition under Subsection (2) for challenging an employee's exclusion from a unit because of supervisory or confidential status. Thus, even assuming the Property Specialist position is substantially the same as the Asset Manager position, I find the position was excluded previously from the unit because it was supervisory, not because it was a mutual clarification on the scope of the bargaining unit or the status of the position. Employer did not present evidence Union agreed to exclude non-supervisory Asset Managers from the bargaining unit. Further, Employer did not produce sufficient evidence that Union knew or should have known supervisory duties were no longer part of the Asset Manager's job description. I find the earliest time when Union could have known would have been the job posting for Dana Kelly's position in February 2000, and Union questioned this position by listing it as a position of interest or concern in the year 2000 bargaining session.

Based on the above, I find no evidence Union explicitly excluded non-supervisory Asset Manager positions from the bargaining unit. Additionally, I find Employer did not make a sufficient showing that Union historically accepted the non-supervisory Asset Manager positions as exempt from the bargaining unit. If anything, the evidence shows Union continually attempting to include

Asset Managers in the unit, but failing because the positions were supervisory. I find a position cannot achieve a historical exemption from the bargaining unit when the position has been excluded as supervisory. Accordingly, I find non-supervisory Asset Manager positions are part of the bargaining unit.

**Administrative Assistant I.** Employer defines the Administrative Assistant I position as performing “responsible, confidential . . . duties in support of a department director . . .” The position description also indicates the Administrative Assistant I position may exercise direct supervision over clerical staff. The parties agree the current position holder (Michele Gill) does not exercise supervisory or confidential duties, and Union contends Gill performs straightforward secretarial duties for Asset Managers. Employer did not dispute the nature of the duties, instead Employer relies upon the ERB’s exclusion of the Administrative Assistant position from the bargaining unit in *HAP II*.

I find the ERB excluded the Administrative Assistant from the bargaining unit because the position was confidential. Currently Union concedes the Administrative Assistant II and III position are excluded from the bargaining unit because they are supervisory or confidential. Reyes testified the Administrative Assistant was initially excluded from the bargaining unit because it was a confidential position, and the later-added Administrative Assistant positions were excluded because they were either supervisory or confidential.

I find that by classifying a non-supervisory, non-confidential position as an Administrative Assistant, Employer is attempting to bootstrap what appears to be a bargaining unit position into the group of positions historically excluded from the bargaining unit because of their supervisory or confidential status. Employer concedes the Administrative Assistant I position is neither supervisory nor confidential. The position was created and posted in October 1999, and Union questioned this position by listing it as a position of interest or concern in the year 2000 bargaining session. Based on the above, I find no evidence Union explicitly excluded the non-supervisory Administrative Assistant I position from the bargaining unit. Additionally, I find Employer did not make a sufficient showing that Union historically accepted the non-supervisory Administrative Assistant I position was exempt from the bargaining unit. Accordingly, I find the non-supervisory Administrative Assistant I position is part of the bargaining unit.

**Property Specialist.** The Property Specialist position first existed as an Administrative Assistant position when it was created in the Spring of 2000. In the Fall of 2000 the job title was changed to Property Specialist to better reflect its actual functions, and some additional duties were added. Until January 2001 (several months after this grievance was filed), this position included supervisory responsibilities, but now the position is not supervisory. There is no evidence Union ever agreed to exclude a non-supervisory Property Specialist position from the bargaining unit. Employer did not inform Union when the supervisory duties were removed from the position.

At the time the grievance was filed, the position was supervisory. Even though the Property Specialist position was supervisory at the time the grievance was filed, Employer did not raise that objection before the hearing. Furthermore, the parties stipulated all the grieved positions were non-supervisory and non-confidential. I can only conclude the parties consented to my authority to determine the status of this position. Based on the above, I find no evidence Union explicitly excluded the non-supervisory Property Specialist position from the bargaining unit. Additionally, I find Employer did not make a sufficient showing that Union historically accepted the non-supervisory Property Specialist position was exempt from the bargaining unit. Accordingly, I find the non-supervisory Property Specialist position is part of the bargaining unit.

## **AWARD**

1. For the reasons stated herein, the grievance is PARTIALLY GRANTED.
2. Non-supervisory Asset Manager positions are part of the AFSCME bargaining unit.
3. The Administrative Assistant I position is part of the AFSCME bargaining unit.
4. The Housing Program Analyst position is part of the AFSCME bargaining unit.
5. The Property Specialist position is part of the AFSCME bargaining unit
6. The remainder of Union' s grievance is DENIED.
7. In accordance with CBA Article 10.8, Employer and Union shall pay my costs and fees related to this arbitration on an equal basis.

Respectfully submitted this 17<sup>th</sup> day of August 2001.

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William F. Reeves  
Arbitrator

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Certificate of Service: The undersigned hereby certifies that on the 17<sup>th</sup> day of August 2001, a true and correct copy of this Opinion and Award was mailed to the following: Monica Smith and Howard Rubin.

by \_\_\_\_\_